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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

TERRENCE FERGUSON,
Plaintiff,
v.
EPIC GAMES, INC., and DOES 1
THROUGH 10,
Defendants.

CASE NO. 2:18-cv-10110-CJC(RAOx)

The Honorable Cormac J. Carney

**SUPPLEMENTAL DECLARATION
OF DALE M. CENDALI, ESQ. IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS, SPECIAL
MOTION TO STRIKE (ANTI-
SLAPP), AND REQUEST FOR
JUDICIAL NOTICE**

Complaint Filed: February 8, 2019

Hearing Date: March 11, 2019

Time: 1:30 p.m.

Courtroom: 7C, 350 W. 1st St.

1 I, Dale M. Cendali, Esq., declare as follows:

2 1. I am a partner at the law firm of Kirkland & Ellis LLP, counsel of record
3 for Epic Games, Inc. (“Epic Games”). I am licensed to practice law in the State of
4 New York and am admitted *pro hac vice* to practice before this Court. I submit this
5 supplemental declaration in support of Epic Games’ motion to dismiss, special motion
6 to strike (anti-SLAPP), and request for judicial notice, filed on February 11, 2019
7 (Dkt Nos. 50, 52) to bring to the Court’s attention information material to its motion
8 that Epic Games just learned late yesterday afternoon. In particular, Epic Games has
9 learned that the Copyright Office has twice rejected Plaintiff’s applications to register
10 the “Milly Rock” dance at issue in this case.

11 2. Plaintiff’s original Complaint was filed on December 5, 2018. Dkt. No.
12 1. The original Complaint alleged that Plaintiff was “in the process of registering the
13 Milly Rock dance with the United States Copyright Office” and that on December 4,
14 2018, Plaintiff “submitted an application for copyright registration of the Milly Rock
15 dance and assigned Copyright Office case number 1-7192939861.” The Complaint,
16 however, did not attach a copy of the copyright application, nor the deposit copy
17 depicting the work that Plaintiff submitted to the Copyright Office as its specimen.

18 3. On December 19, 2018, pursuant to Copyright Office rules and
19 regulations (37 C.F.R. § 201.2(d)(2)(ii)), Epic Games submitted a Litigation
20 Statement Form LS requesting a copy of the copyright application, the deposit, and
21 any correspondence with the Copyright Office regarding the pending application.

22 4. As Epic Games had not yet received any information from the Copyright
23 Office, on January 17, 2019, my partner, Joshua Simmons, e-mailed counsel for
24 Plaintiff requesting those items directly from Plaintiff. A true and correct copy of that
25 e-mail is attached hereto as **Exhibit F**.

26 5. On January 18, 2019, the Copyright Office provided Epic Games with a

1 copy of Plaintiff's copyright application form—previously submitted to the Court as
 2 Exhibit A to the Declaration of Dale M. Cendali Esq., dated February 11, 2019 (Dkt.
 3 No. 53-01)—but at that time did not provide a copy of the correspondence regarding
 4 Plaintiff's application or the deposit copy.

5 6. On January 20, 2019, counsel for Plaintiff responded to my partner's
 6 January 17, 2019 e-mail by providing Plaintiff's deposit copy for the "Milly Rock
 7 Dance" but not the application nor any Copyright Office correspondence. A true and
 8 correct copy of that e-mail is attached hereto as **Exhibit G**.

9 7. On January 25, 2019, the parties met and conferred pursuant to Local
 10 Rule 7-3 regarding the grounds on which Epic Games would move to dismiss.
 11 Counsel for Epic Games informed Counsel for Plaintiff that one of the grounds upon
 12 which it intended to move to dismiss was that the alleged dance movement was not
 13 protectable by Copyright, specifically citing the Copyright Office Compendium to that
 14 effect. Counsel for Plaintiff did not mention the status of Plaintiff's copyright
 15 application nor any Copyright Office correspondence that Plaintiff had received.

16 8. On February 8, 2019, Plaintiff filed his Second Amended Complaint,
 17 again asserting infringement of the "Milly Rock Dance" (1-7192939861), which
 18 Plaintiff again alleged was "in the process of registering . . . with the United States
 19 Copyright Office." No mention was made of any correspondence with the Copyright
 20 Office.

21 9. In the late afternoon of February 13, 2019, Epic Games received from the
 22 Copyright Office a copy of the E-File Correspondence regarding the "Milly Rock
 23 Dance" (1-7192939861), pursuant to its December 19, 2018 request noted above. A
 24
 25
 26

1 true and correct copy of the correspondence is attached hereto as **Exhibit H.**¹

2 10. The correspondence we received from the Copyright Office yesterday
3 afternoon discloses, among other things, that also on December 19, 2018, the
4 Copyright Office rejected Plaintiff's application for the "Milly Rock Dance" (1-
5 7192939861) asserted in the Complaint. The Copyright Office stated:

6
7 [O]n October 10, 2018 under service request number 1-6882249391, the
8 Office received a related choreographic claim by the same author and
9 claimant named on the application for *Milly Rock* Dance for a work
10 entitled *2 Milly Rock*. Expedited handling was requested for 2 Milly
11 Rock on the basis of prospective litigation. The deposit submitted with
12 the October 10th application consists of a short video of approximately
13 two dozen children imitating a simple routine or social dance move being
14 demonstrated by three people at the front of the room. Notably, the video
15 appears to be a demonstration of a particular social dance move,
16 popularly known as the Milly Rock. *See Compendium (Third)* § 309.2
17 (noting that the Office may take administrative notice of facts or matters
18 known to the Office or the general public).

19
20 The Office expeditiously refused registration for *2 Milly Rock* in a letter
21 dated October 16, 2018. The refusal letter explained that the work did
22 not constitute a choreographic work, but rather represented a simple
23 dance routine. As the the legislative history of the 1976 Act states,

24
25 ¹ To the extent judicial notice is required, Epic Games respectfully seeks to
26 supplement its prior Request for Judicial Notice (Dkt. No. 52) to include this
27 Copyright Office correspondence.

1 choreography does not include social dance steps or simple routines.
 2 H.R. REP. NO. 94-1476, at 53-54 (1976).

3
 4 The current application for *Milly Rock Dance*, submitted on December 4,
 5 2018 under service request number 1-7192939861, was sent with a
 6 different deposit: a video of an individual on top of the roof of a parked
 7 car performing simple dance movements in an improvisational manner,
 8 including the 2 *Milly Rock* dance that had previously been refused by the
 9 Office on October 16, 2018. The Office also takes notice that, unlike the
 10 October 10th application, for which you requested “special handling” due
 11 to prospective litigation, you did not request special handling for the
 12 December 4th submission, which was filed the day before an
 13 infringement suit was initiated. While the video submitted for
 14 registration with the December 4th application is different and longer
 15 than the video submitted with the October 10th application, the Office
 16 finds that this longer routine of improvisational dance movements does
 17 not constitute a work of choreography. The movements represented in
 18 the video deposited for *Milly Rock Dance* depict a simple routine made
 19 up of social dance steps and do not represent an integrated, coherent and
 20 expressive compositional whole and is thus not eligible for copyright
 21 registration.

22
 23 11. As Epic Games did not have the correspondence with the Copyright
 24 Office, including its rejection of the “Milly Rock Dance” (1-7192939861), at the time
 25 that it filed its motion to dismiss on Monday, February 11, Epic Games is respectfully
 26

1 providing this information now for the Court's consideration.

2
3 I declare under penalty of perjury that the foregoing is true and correct.

4
5 Executed on February 14, 2019


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Attorney for Defendant Epic Games, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing
**SUPPLEMENTAL DECLARATION OF DALE M. CENDALI, ESQ. IN
SUPPORT OF DEFENDANT’S MOTION TO DISMISS AND SPECIAL
MOTION TO STRIKE (ANTI-SLAPP) AND REQUEST FOR JUDICIAL
NOTICE** and exhibits attached thereto with the Clerk of the Court using the CM/
ECF system, which will automatically send a notice of electronic filing to all persons
registered for ECF.

/s/ Dale M. Cendali

Dale M. Cendali